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No. 01-1299

In the

Supreme Court of the United States

GREGORY C. WATTS,

Petitioner,

v.

THE CITY OF NORMAN, a political subdivision of the State of Oklahoma,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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This Supplemental Brief is filed pursuant to Sup. Ct. R. 15.8 in order to call the Court's attention to a new case pending that was not available at the time Watts' Reply Brief was filed in this case. Watts respectfully shows the Court as follows:

1. On **May 7, 2002**, the undersigned counsel for Watts, Kenneth Ray Feagins, learned that on **April 16, 2002**, a petition for certiorari has been filed on behalf of an *employer* in another employment discrimination disparate discipline case involving similarly situated comparables, to wit: *Fulton County, et al. v. Lambert, et al.*, No. 01-1568 *("Fulton County")*. *Fulton County* was

docketed on **April 23, 2002** (Response due May 23, 2002) and the cert. petition was unknown and unavailable to the undersigned counsel at the time he filed the Reply Brief on behalf of the petitioner in this case on **April 19, 2002**.

2. *Fulton County* arises out of the Eleventh Circuit and involves the application of Rule 50 of the Federal Rules of Civil Procedure to an employment discrimination disparate discipline case brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII").

3. The *evidentiary burden of proof* issue presented by the ***employee*** in this case is whether the evidence of pretext is sufficient to withstand the employer's motion for summary judgment under **Rule 56** of the Federal Rules of Civil Procedure. Pet. 6-10; Br. in Opp. 10; and, Reply Br. 1-5.

4. The *evidentiary burden of proof* issue presented by the **employer** in *Fulton County* is whether the employees' evidence of pretext **presented at trial** is sufficient to withstand the employer's motion for judgment as a matter of law under **Rule 50** of the Federal Rules of Civil Procedure. *See Fulton County* Petition.

5. As Watts explained in his Reply Brief, this Court has observed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986), and more recently in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2102 (2000), the "inquiry under each is the same." Reply Br. 6 n.3.

6. The evidentiary burdens of proof issues raised under Rule 56 of the Federal Rules of Civil Procedure by the petition in this case and the evidentiary burden of proof issues raised under Rule 50 of the Federal Rules of Civil Procedure by

the petition in *Fulton County* present important questions concerning the application of the Federal Rules of Civil Procedure to employment discrimination claims arising under Title VII. For example, the Attorney General and the EEOC share in responsibility for enforcing Title VII and other federal employment discrimination laws. The Court's decisions in this case and in *Fulton County* are likely to affect the enforcement responsibilities of the EEOC and Attorney General. The Title VII issues raised in this case and by the petition in *Fulton County* apply to the federal government in its capacity as the nation's largest employer. Reply Br. 6.

7. The recent petitions for certiorari filed by both, employees and employers, in *Watts* and *Fulton County*, respectively, and recent articles published by practitioners who represent management, *see* Adam C. Wit, *The 'Similarly Situated Individual': Evidence of Comparable Employees and Its Application in Employment Discrimination Litigation*, 23 Empl. Rel. L.J. 31 (3/Winter 1997), and plaintiffs, *see* David L. Hudson, Jr., *Will the Sixth Circuit Stick to One Standard with Respect to 'Similarly Situated' Employees?*, Tenn. B.J. 25 (November 2001), clearly demonstrate the national importance of, and confusion regarding, the appropriate standard for determining "similarly situated" comparables in Title VII employment discrimination disparate discipline cases based on circumstantial evidence and governed by the *McDonnell Douglas* burden-shifting framework.

CONCLUSION

For the foregoing reasons, those set forth in the Watts' Reply Brief and in the petition, it is respectfully submitted that the petition in this case should be granted.

May 8, 2002.

Respectfully submitted,

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